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Supreme Court of the United States

October Term, 1957

No. 498

BROOKLYN EAGLE, INC.,

Petitioner,

vs.

M. MICHAEL POTOKER, as Secretary Treasurer of Newspaper Guild of New York, Local 3, ANG, CIO,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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Our petition, we believe, establishes that the question of federal preemption of the enforcement of arbitration agreements affecting commerce * is one requiring an authoritative answer by this Court. Indeed, there is nothing to the contrary in respondent's brief. The present reply brief is submitted to refute respondent's first argument (Brief, pp. 4-8) why the question should not be answered promptly—and in this case.

Respondent's argument that the federal question was not timely raised below is completely without merit (*Shea* v. *Export Steamship Corp.*, 253 N. Y. 17 at 21, quoted at p. 7 of petition). The point, involving as it does jurisdiction of the subject matter, could be raised at any time. It could never be waived; and, as we have seen, it was not waived under the New York State practice. Even if the word "timely" were synonymous with "promptly" in this context, the petitioner's presentation of the point was timely. The *Guss* case (353 U. S. 1) and the other cases

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* There is no real question in this case as to the status of the Brooklyn Eagle, Inc. in interstate commerce. The National Labor Relations Board has twice exercised jurisdiction over it (*In re Brooklyn Daily Eagle and Newspaper Guild of New York*, 13 N. L. R. B., No. 103, 14 N. L. R. B., No. 11, 4 LRRM 371; *In re Brooklyn Daily Eagle and Newspaper Guild of New York*, 18 N. L. R. B., No. 17, 5 LRRM 613).

decided with it, which settled the preemptive effect of other portions of the Labor Management Relations Act, 1947 (cited at pp. 11-12 of our petition), were not decided until March 25, 1957, several months after the present case had been argued in the New York Court of Appeals. The *Goodall-Sanford, Inc.* case (353 U. S. 550) and the other cases decided with it, which for the first time authoritatively settled the jurisdiction of the federal courts in the enforcement of arbitration provisions of collective bargaining agreements affecting commerce (cited at p. 9 of our petition) were not decided by this Court until after the decision of the appeal in this case by the New York Court of Appeals. Indeed, in our motion for reargument in the New York Court of Appeals we pointed out that *certiorari* had been granted by this Court in those cases but that they had not yet been decided by this Court. Under these circumstances, we submit that our presentation of the point was clearly timely. (Cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 678, 50 S. Ct. 451).

Respondent argues that denial by the New York Court of Appeals of petitioner's motion in the alternative for reargument or for amendment of the remittitur is a conclusive adjudication that the federal question was not considered below. We do not accept this conclusion either as a matter of law or as an inference of fact. It seems an especially tenuous inference to draw in this highly sensitive field of ouster of state court jurisdiction, and all the more so in view of the unusual step taken by the Court of Appeals in expressly inviting discussion of the point (our petition, pp. 7-8, 41). In any event, it is unquestionable that either the Court of Appeals actually considered the question or that it was under a duty to do so. As we have seen, it is settled as a matter of New York procedural law that this question of jurisdiction of the subject matter could be raised at any stage and indeed must be considered by the state court on its own motion even if not raised at any time by anyone. This Court has held (*Williams* v. *Georgia*, 349 U. S. 375, 383, 75 S. Ct. 814) that " • • • where a State allows questions of this sort to be raised at a late stage and

be determined by its courts [even]* as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right." (See also *Rogers* v. *Alabama*, 192 U. S. 226, 230-231, 24 S. Ct. 257).

Until the question of preemption in these cases is authoritatively answered by this Court, a growing volume of litigation on this subject will arise all over the country. For example, it has already arisen in a New York case, decided after the date of this petition, in which a New York Supreme Court justice has concluded that the state court's jurisdiction is concurrent and has not been ousted. [*In re Steinberg* (N. Y. Sup. Ct., N. Y. Co., September 17, 1957), 40 LRRM 2619.]

Respondent does not argue, as indeed it hardly could, against the growing importance and urgency of the question which we have raised. Its main opposition to acceptance of the case by this Court is in the form of procedural hurdles which, in our view, are without substance or merit. They are totally inadequate to block an early, final and authoritative pronouncement by this Court on the question involved.

Dated: October 18, 1957.

Respectfully submitted,

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* Added by us.